STATE OF MICHIGAN

COURT OF APPEALS

GRAND BLANC VENTURE, L.L.C., Plaintiff-Appellant,	UNPUBLISHED June 10, 2008
v	No. 276311 Genesee Circuit Court
CHARTER TOWNSHIP OF GRAND BLANC, Defendant-Appellee.	LC No. 03-077456-CZ

Before: Whitbeck, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

I. Overview

This action arises from defendant Grand Blanc Township's ("the Township") enforcement of its research and development ("R&D") zoning classification of plaintiff Grand Blanc Venture, L.L.C.'s ("Venture") property. Following a bench trial, the trial court entered a judgment of no cause of action in favor of the Township. Venture now appeals as of right.

Venture alleges the that Township's enforcement of the R&D zoning of Venture's property effected a regulatory taking without just compensation and violated Venture's substantive due process rights. However, as we will explain, Venture has failed to overcome the presumption of validity of the zoning or show that the Township's decision was a violation of substantive due process. Moreover, Venture's argument that there was a regulatory taking fails when analyzed under any of the takings tests.[1] Accordingly, we affirm.

II. Basic Facts And Procedural History

A. Underlying Facts

In 1999, Venture signed a purchase agreement to acquire 171 acres of property in Grand Blanc Township, located between I-75 and Saginaw Road, south of Baldwin Road. Venture is an investment entity created by the principals and management of Talon Corporation for the sole purpose of buying and developing this piece of property.

[1] See *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576-577; 575 NW2d 531 (1998).

After the purchase agreement was signed, but prior to closing, Venture petitioned the Township's planning commission to rezone the 171-acre property as a planned unit development ("PUD"). Venture proposed a mixed PUD use of residential and commercial uses. The planning commission unanimously recommended that the petition be denied. Venture did not proceed to the Township's Board of Trustees for a decision.

Venture closed on the purchase in late June 2000 for $4.6 million. (The purchase price was later amended and increased to $4.9 million, in exchange for postponing a balloon payment on a mortgage by four years, until December 2006.) At the closing, Venture immediately sold off 43 of the 171 acres, fronting Baldwin Road, for $1.96 million. These 43 acres were zoned medium density residential. The remaining 128 acres were zoned R&D. In 1999, Venture had also purchased three additional parcels, totaling one acre, for $455,000. The parcels front Saginaw Road, are contiguous to the larger parcel, and are also zoned R&D.

The Township's zoning ordinance allows the following permitted uses in an R&D district: (1) research, design, testing, and pilot (or experimental) programs; (2) experimental, film, or testing laboratories; (3) vocational schools and technical training facilities; (4) computer programming, data processing, and computer related services; (5) medical offices, clinics, and research facilities, including auxiliary or accessory laboratories; (6) banks, credit unions, and other financial institutions, including automatic teller machines and drive-through windows; (7) manufacture and assembly of electrical appliances, electronic instruments or devices, and audio-visual equipment; (8) publicly owned and operated buildings; (9) essential services buildings without storage yards; (10) public or private parks and open space; and (11) accessory structures and uses. With the approval of the planning commission, the ordinance allows the following special land uses: (1) manufacture, processing, and packaging of various products (but not large stamping plants); (2) essential services with storage yards; (3) accessory stamping, grinding, or other operations generating significant noise levels; (4) where at least two buildings have been developed (or are under construction), and up to a maximum of ten percent (of the land area): office supply, child care, business services such as printing and copying, restaurants, corporate (not pubic) fitness centers, spas, and other athletic and recreational uses; (5) accessory heliports; (6) uses of the same nature as the principal uses, but not listed elsewhere in the ordinance; and (7) uses accessory to the listed special land uses.

In February 2003, Venture petitioned to have its 129-acre R&D parcel rezoned to general commercial. But the Township's Board of Trustees denied Venture's petition in September 2003.

In October 2003, Venture filed this action, alleging that the denial of its February rezoning petition was a violation of substantive due process (count I), was a regulatory taking without just compensation (count II), constituted exclusionary zoning (count III), and violated the zoning enabling act (count IV). Counts III and IV were later dismissed by stipulation. Only counts I and II are at issue in this appeal.

The Township had adopted a master plan in 1991. In 1998, the Township's planning commission adopted the Holly Road/Baldwin Road/Saginaw Street Corridor Plan and the Hill Road Corridor Plan. The Township adopted a new master plan in September 2004, which designated Venture's site as R&D. However, because the 2004 master plan was not in effect at relevant times, we will not discuss it, nor the process and discussions that preceded its adoption.

B. The Trial Court's Decision

In December 2006, the trial court delivered its findings of fact and conclusions of law. The trial court summarized the parties' positions as follows: Venture contended that, despite having aggressively marketed the property to potential end users for any of the uses permitted under the R&D zoning, there was no market demand for the property as zoned. Although conceding that there might be future demand for R&D property, Venture asserted that the only present interest was from entities seeking commercial development. The Township argued that Venture had not been marketing the property properly, pointing out that Venture's asking price was too high; and that Venture was marketing the property as general commercial, rather than R&D; and that Venture had not considered all development options. The Township contended that, based on the appraisals submitted, the land retained significant value as zoned and that the zoning classification furthered a legitimate state interest.

The trial court first rejected Venture's argument that the appraisals presented by both sides were based on future expectations, not present day realities. Rather, the trial court found, the appraisals "were based on current conditions and what the property would be worth taking into account what might happen in the future." The trial court stated that "present value is always dependent somewhat on speculation into the future."

The trial court agreed with the Township that a zoning ordinance is presumed to be valid. The trial court stated that this case did not involve a decision to rezone Venture's property against Venture's will, so the higher standard of review that might be applied in spot zoning cases did not apply in the present case.

The trial court found that, aside from arguing that the Township had not identified a reasonable interest being advanced by the R&D classification, Venture made only a half-hearted attempt to show that the decision to maintain the current zoning did not advance a legitimate state interest. The Township, on the other hand, made exhaustive efforts to identify the interests supporting the decision, using the 1991 master plan, the 1998 corridor plan, and the 2004 master plan. The trial court found that "the current zoning classification advances multiple state interests including but not limited to protection of environmentally sensitive areas, promotion of balanced land use, sensitivity to traffic patterns and traffic density, and an attempt to strive for a unified image in the area as new development occurs."

The trial court then concluded that Venture has "not established a categorical taking of the property that ha[d] deprived [Venture] of all economically beneficial uses of the land." More specifically, the trial court found that the appraisals demonstrated that the property retained significant value. The trial court added that Venture's lack of marketing success may well be related to the asking price, no less than $7 million. Further, Venture had not shown that it was precluded from using the property for any purpose for which it is reasonably adapted, including research and development, laboratories, computer related services, office uses, or any special uses that may be authorized in the R&D district.

Applying a three-part balancing test, the trial court found that the character of the Township's actions was compliance with the master plan and that the Township's actions did not burden Venture's property differently than other similarly situated property. Concerning the economic impact of the Township's decision, the trial court again found that the property

retained significant value, and that "[n]o effort has been made to develop the property within the permitted classifications or as a planned unit development." Last, the trial court found that the property had been zoned R&D "for a significant time prior" to purchase, and that Venture's own marketing studies concluded that the property was ideal for R&D use. Thus, Venture's investment-backed expectations were to use the property as R&D, and the Township had done nothing to interfere with those expectations. Although knowledge of the existing zoning did not preclude Venture's challenge, a person with such knowledge could develop few, if any, legitimate investment backed expectations of development rights that rise to the level of constitutionally protected rights. The government could not be the guarantor of the investment risks that a person chose to take in the face of regulatory impediments. Accordingly, the trial court found that Venture failed to establish any of the elements necessary to prevail under the balancing test, or any other takings test.

The trial court entered a judgment of no cause of action in January 2007. Venture now appeals.

III. Judgment of No Cause of Action

A. Standard Of Review

Venture argues that the trial court's judgment of no cause of action on its substantive due process and regulatory taking claims is clearly erroneous and against the great weight of the evidence. We review for clear error a trial court's findings of fact at a bench trial.[2] We give regard to the trial court's special opportunity to evaluate the credibility of witnesses who appeared before it.[3] A finding is clearly erroneous when, although there is evidence to support it, the appellate court is left with a definite and firm conviction that a mistake has been made.[4] We review de novo questions of law.[5] The trial court may grant a new trial when a verdict is against the great weight of the evidence, but only when the evidence preponderates *so* heavily against the verdict that it would be a serious miscarriage of justice to allow the verdict to stand.[6]

B. Substantive Due Process

In *Village of Euclid v Ambler Realty Co*, the United States Supreme Court held that a municipal zoning ordinance will survive a substantive due process challenge so long as it is not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety,

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[2] *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000).

[3] *Morris v Clawson Tank Co*, 459 Mich 256, 271; 587 NW2d 253 (1998).

[4] *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 410-411; 531 NW2d 168 (1995), overruled in part on other grounds *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 116-117, n 8; 595 NW2d 832 (1999).

[5] *Sands Appliance Services, supra* at 238.

[6] *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 518; 679 NW2d 106 (2004).

morals, or general welfare."[7] This substantial relation test "probes the regulation's underlying validity."[8] As explained in *Lingle v Chevron USA, Inc*, "such an inquiry is logically *prior to and distinct* from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose."[9] Thus, "if a government action is found to be impermissible—for instance because it . . . is so arbitrary as to violate due process—that is the end of the inquiry."[10]

In evaluating the reasonableness of a zoning classification, however, it is not a court's function to sit as a "super-zoning commission."[11] Further, a zoning ordinance carries a "presumption of validity" and "it is the burden of the party attacking to prove affirmatively that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property."[12] But as the Michigan Supreme Court explained in *Brae Burn, Inc v Bloomfield Hills*:

> This is not to say, of course, that a local body may with impunity abrogate constitutional restraints. The point is that we require more than a debatable question. We require more than a fair difference of opinion. It must appear that the clause attacked is an arbitrary fiat, a whimsical *ipse dixit*, and that there is no room for a legitimate difference of opinion concerning its reasonableness.
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> To put it in another way, we have no "Woodward avenue rule," no "traffic" rule as such, no "diminution in value" rule. All these are merely factors to be considered, pieces of the mosaic. The question always remains: As to this property, in this city, under this particular plan (wise or unwise though it may be), can it fairly be said there is not even a debatable question? If there is, we will not disturb.[13]

Venture argues that because this case involves a challenge to the Township's denial of Venture's request to rezone its property to general commercial use, it should be treated as a challenge to a discrete zoning decision rather than against the zoning ordinance and, therefore, the presumption of validity does not apply. Instead, Venture argues that a stricter-scrutiny test applies, that is: whether the Township's decision advanced a legitimate government interest, whether it was an unreasonable means of advancing a legitimate government interest, and

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[7] *Village of Euclid v Ambler Realty Co*, 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926).

[8] *Lingle v Chevron USA, Inc*, 544 US 528, 543; 125 S Ct 2074; 161 L Ed 2d 876 (2005).

[9] *Id*. (emphasis added).

[10] *Id*.

[11] *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425, 430; 86 NW2d 166 (1957).

[12] *Id*. at 432.

[13] *Id*. at 432-433; see also *Kropf v Sterling Heights*, 391 Mich 139, 162; 215 NW2d 179 (1974).

whether it unreasonably, arbitrarily, and capriciously excluded other types of legitimate land uses from the area in question.[14] We disagree.

In *City of Essexville v Carrollton Concrete Mix, Inc*, this Court considered a claim that when the defendant rezoned the plaintiff's property from an industrial to a development district, the city engaged in spot zoning for the purpose of lowering the value of the land, so that the property could later be acquired, as provided in the master plan, as part of a scheme to improve the residential character of the city.[15] Relying on *Penning v Owens*,[16] and *Anderson v Highland Twp*,[17] the "so-called 'spot zoning' cases," the trial court in *Essexville* agreed with the plaintiff's spot-zoning theory.[18] On appeal, this Court explained:

> [W]hen a discrete zoning decision is made regarding a particular parcel of property—typically a decision involving an amendment or variance that results in allowing uses for specific land that are inconsistent with the overall plan as established by the ordinance—the courts will apply greater scrutiny. Those isolated or discrete decisions are more prone to arbitrariness because they are micro in nature, i.e., the decisions are based on the particular land and circumstance at issue in the request for amendment or variance. To the contrary, macro decisions made by the local body, such as the enactment of a new zoning ordinance, typically reflect a decision on how the city will be developed in the years to come, i.e., are made pursuant to an overall plan of action.[19]

The Court went on to hold that the *Penning* and *Anderson* "arbitrariness of zoning ordinances" test did not apply because the defendant's decision to rezone the plaintiff's property was made pursuant to a plan and was not a haphazard or piecemeal decision; therefore, it did not constitute spot zoning.[20] Thus, instead of applying *Penning* and *Anderson*, the Court applied the deferential *Brae Burn* and *Kropf* "general principles of reasonableness" test, including its presumption of validity.[21]

Although Venture here relies on *Essexville* in support of its substantive due process argument, it concedes that it has never argued that the Township's denial of its rezoning petition

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[14] Because Venture does not address its exclusionary zoning claim on appeal, the last portion of this test does not apply, regardless of the scrutiny level otherwise applicable to the Township's decision.

[15] *City of Essexville v Carrollton Concrete Mix, Inc*, 259 Mich App 257, 259-263; 673 NW2d 815 (2003).

[16] *Penning v Owens*, 340 Mich 355; 65 NW2d 831 (1954).

[17] *Anderson v Highland Twp*, 21 Mich App 64; 174 NW2d 909 (1969).

[18] *Essexville*, *supra* at 265.

[19] *Id*. at 274-275.

[20] *Id*. at 275-277.

[21] *Id*. at 274-275.

constituted spot zoning. That is precisely why the stricter test this Court *discussed* in *Essexville* does not apply here, and instead, why the more deferential test this Court actually applied in *Essexville* governs Venture's claim. The trial court correctly found that, because this is not a spot-zoning case, it must evaluate Venture's substantive due process claim pursuant to the *Brae Burn* and *Kropf* deferential "general principles of reasonableness" test, including the presumption of validity, and not the *Penning* and *Anderson* "arbitrariness of zoning ordinances" test.

Venture also argues that, even if there was no spot zoning, this case involves a discrete, isolated zoning decision, so the stricter *Penning* and *Anderson* test should still apply. We disagree. The denial of Venture's February 2003 rezoning petition was not a discrete, isolated, micro decision. Rather, it represented a refusal to change a macro decision concerning how the township will be developed in the years to come, which was made pursuant to an overall plan of action. By contrast, a decision to grant Venture's petition would have been a discrete and isolated micro decision. Thus, the stricter test advocated by Venture does not apply.

In *A & B Enterprises v Madison Twp*,[22] this Court reversed a trial court's decision that held that Madison Township's denial of the plaintiff's rezoning petition was a violation of substantive due process. On appeal, this Court applied the *Brae Burn* and *Kropf*'s deferential test, including the presumption of validity.[23] In finding no due process violation, this Court considered evidence that the current zoning was appropriate and that the proposed zoning was incompatible because it was much more intensive than the surrounding residential uses.[24] The Court noted that "[m]erely because [the] plaintiff's planned [trailer] park met some of the conditions in the township's [master] plan for a park does not render [the] defendants' decision to deny the rezoning petition arbitrary and capricious."[25] Madison Township was also entitled to consider public opposition to the plaintiff's rezoning request.[26]

Here, the Township introduced evidence that the R&D zoning of Venture's property was less intensive than a general commercial use, and therefore, was more compatible with the surrounding residential uses. Venture sought to show that general commercial development would not affect the residential properties across the road and asserted that it would provide buffers for the adjacent residential uses. Venture introduced evidence that, at peak weekday hours, both general commercial and R&D uses would generate approximately the same amount of traffic, while the Township introduced evidence that a general commercial use will generate considerably more *total* traffic. The Township attempted to show that a general commercial big-box, mall-style development, containing expansive parking lots, would have a deleterious environmental impact on the property's wetlands, while Venture attempted to show that it intended to develop the property in an environmentally sensitive manner. We note that, if

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[22] *A & B Enterprises v Madison Twp*, 197 Mich App 160, 161-162; 494 NW2d 761 (1992).

[23] *Id*. at 162.

[24] *Id*. at 163.

[25] *Id*.

[26] *Id*. at 164.

rezoned, the property could be developed in any manner permitted in a general commercial district, and need not be developed as then planned by Venture.

Venture noted that the Township's decision to retain the property's R&D zoning was contrary to the 1991 master plan, which envisioned residential development on the property. However, general commercial zoning was equally inconsistent with the residential designation of the 1991 master plan. The master plan was later amended to reflect the Township's plan that the property be used for R&D development, in accordance with its zoning classification.

Venture introduced evidence that general commercial zoning for the property would be consistent with the intent of the zoning ordinance in terms of its location near a freeway and a major arterial road, and its concentration of uses in a single location. The Township sought to show that commercial uses were already concentrated near the city of Grand Blanc, and that allowing them in the outskirts of the county would be contrary to the intent of the zoning ordinance.

The fact that Venture's property meets some of the criteria for general commercial development is not grounds to find a due process violation. The record shows that there is room for legitimate differences of opinion concerning issues of compatibility with neighborhood uses, traffic impact, and environmental impact of R&D versus general commercial zoning. Thus, it is evident that, with respect to Venture's property, in this location, under the Township's zoning ordinance, the appropriateness of R&D versus general commercial zoning is a debatable question. Therefore, under the *Brae Burn* and *Kropf* "general principles of reasonableness" test, Venture failed to overcome the presumption of validity or show that the Township's decision was a violation of substantive due process. In sum, we conclude that the trial court did not err in finding that the Township's decision to deny Venture's rezoning petition was not a violation of substantive due process.

C. Takings Clause

(1) Overview

The Takings Clause "does not bar government from interfering with property rights, but rather requires compensation in the event of otherwise proper interference amounting to a taking."[27] In *Lingle*, the United States Supreme Court explained that its decisions have "stake[d] out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes."[28] "First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation."[29] "A second categorical rule applies to regulations that completely deprive an owner of *all* economically beneficial use of [] property."[30] Third, "[o]utside these two relatively narrow

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[27] *Lingle*, *supra* at 543 (internal quotations and citation omitted).

[28] *Id*. at 538.

[29] *Id*.

[30] *Id*. (internal quotations and citation omitted).

categories . . . regulatory takings challenges are governed by the standards set forth in *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978)."[31] The *Penn Central* balancing test examines the economic impact of the regulation and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations, as well as the character of the governmental action, to determine whether there has been a regulatory taking.[32]

The *Lingle* Court explained:

> Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries . . . share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.[33]

In the first inquiry, a permanent physical invasion is the determinative factor.[34] In the second, "the complete elimination of a property's value is the determinative factor."[35] Additionally, "the *Penn Central* inquiry turns in large part, albeit not exclusively, on the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."[36]

In *K & K Constr, Inc v Dep't of Natural Resources*, the Michigan Supreme Court summarized the various takings tests as follows:

> While all taking cases require a case-specific inquiry, courts have found that land use regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land.
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> The second type of taking, where the regulation denies an owner of economically viable use of land, is further subdivided into two situations: (a) a "categorical" taking, where the owner is deprived of "all economically beneficial or productive use of land," . . . or (b) a taking recognized on the basis of the application of the traditional "balancing test" established in *Penn Central*[, *supra*] . . . .

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[31] *Id*.

[32] *Id*. at 538-539.

[33] *Id*. at 539.

[34] *Id*.

[35] *Id*.

[36] *Id*. at 540.

> In the former situation, the categorical taking, a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property. A person may recover for this type of taking in the case of a physical invasion of his property by the government . . . , or where a regulation forces an owner to "sacrifice *all* economically beneficial uses [of his land] in the name of the common good . . . ." In the latter situation, the balancing test, a reviewing court must engage in an "ad hoc, factual inquir[y]" centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations.[37]

Here, Venture argues that it can satisfy all three tests identified by the *K & K Constr* Court: (1) the substantially advances test, (2) the categorical taking test, and (3) the balancing test. Thus, we will analyze each test.

(2) The "Nonsegmentation Principle"

As a preliminary matter, the Township argues that in determining whether a taking has occurred, this Court must consider not only the 130 acres that Venture sought to rezone to general commercial use, but also the 43 residentially zoned acres that Venture sold when it originally acquired the larger parcel, and which were part of Venture's original rezoning request to a PUD.

The "nonsegmentation principle" "holds that when evaluating the effect of a regulation on a parcel of property, the effect of the regulation must be viewed with respect to the parcel as a whole."[38] "Courts should not 'divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.'"[39] "Rather, we must examine the effect of the regulation on the entire parcel, not just the affected portion of that parcel."[40] Contiguous parcels of land, under the same ownership, are considered as whole despite the owner's division of the property into separate, identifiable lots.[41]

"Determining the size of the denominator parcel is inherently a factual inquiry."[42] Relevant factors include the degree of contiguity, the dates of acquisition, and the extent to

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[37] *K & K Constr, Inc*, supra at 576-577 (citations omitted).

[38] *Id.* at 578.

[39] *Id*., quoting *Penn Central, supra* at 130.

[40] *Id*. at 578-579.

[41] *Id*. at 579-580.

[42] *Id*. at 580.

which the parcel has been treated as a single unit.[43] "'The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.'"[44]

Here, the Township's planning commission considered both the parcel at issue and the residential parcel for Venture's initial mixed-use PUD application. However, Venture abandoned the PUD application before closing and did not seek approval from the Township's board of trustees. The two parcels were purchased on the same date, in June 2000, but the residential parcels were sold immediately. Venture later purchased three smaller adjacent R&D parcels fronting Saginaw Road, which were included in the petition to rezone.

The residential parcel was not part of the development scheme at issue in this appeal, although it was part of Venture's initial PUD scheme. While the residential parcel is contiguous, and was purchased at the same time as most of the remaining property, the rezoning petition included three later-acquired parcels. Venture sold off the residential parcel at closing, three years before the Township denied Venture's rezoning petition. Considering the circumstances, we conclude that the trial court properly decided the takings issue without considering the residential parcel.

(3) The "Substantially Advances Test"

Venture argues that denying its rezoning petition, in favor of the existing R&D zoning, constituted a taking because the decision did not substantially advance a legitimate government interest.

The United States Supreme Court has recognized that its decisions, including to some extent *Penn Central*, have expressed the belief that "the application of a general zoning law to particular property effects a taking if the ordinance does not *substantially advance legitimate state interests*."[45] In *K & K Constr*, the Michigan Supreme Court similarly stated that a taking can be found "where the regulation does not substantially advance a legitimate state interest."[46] However, the *Lingle* Court stated that "this formula prescribes an inquiry in the nature of a [substantive] due process, not a takings, test, and that it *has no proper place in our takings jurisprudence*."[47] The *Lingle* Court further stated:

> In stark contrast to the three regulatory takings tests discussed above, the "substantially advances" inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is

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[43] *Id*.

[44] Id. (internal quotations omitted).

[45] *Lingle, supra* at 540, quoting *Agins v City of Tiburon*, 447 US 255; 100 S Ct 2138; 65 L Ed 2d 106 (1980) (emphasis added).

[46] *K & K Constr, supra* at 576.

[47] *Lingle, supra* at 540 (emphasis added).

> *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.[48]

Therefore, the Court explained, "such a test is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment."[49]

Because Michigan takings jurisprudence follows United States Supreme Court decisions,[50] we agree with the Township that the substantially advances test is no longer valid in the context of evaluating a takings claim. Thus, Venture's reliance on that test does not afford a basis for relief.

(4) Categorical Taking

a. Overview

Venture argues that the Township's decision to deny its rezoning petition constituted a categorical taking because the decision deprived it of economically beneficial use of its land. Venture concedes that this case does not involve a physical invasion of Venture's property. Rather, Venture argues that it has been forced to sacrifice all economically beneficial uses of its land in the name of the common good and that the land is either unsuited for use, or unmarketable, as zoned.

In *Bevan v Brandon Twp*, the Michigan Supreme Court held that "a mere diminution in value which results from regulation does not amount to a taking, . . . and that a property owner must prove that the value of his land has been destroyed by the regulation or that he is precluded from using the land as zoned."[51] The property owner must show that the restrictions on the property "preclude its use for any purposes to which it is reasonably adapted."[52] A regulation effects a taking *if* "the property is either *unsuitable for use as zoned* or *unmarketable as zoned*."[53]

b. Unsuitable For Use As Zoned

Venture argues that there is no present market for R&D property, rendering the parcel unsuitable for use as zoned.

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[48] *Id*. at 542.

[49] *Id*.

[50] See *K & K Constr*, *supra* at 576-577.

[51] *Bevan v Brandon Twp*, 438 Mich 385, 402-403; 475 NW2d 37 (1991) (citation omitted).

[52] *Id*. at 403 (citation omitted).

[53] *Id*. (emphasis added).

An ordinance effects a regulatory taking if it precludes the use of the land for any purposes to which it is reasonably adapted.[54] Thus, where a permitted use can be constructed on the property, the plaintiff cannot show that the property is unsuitable as zoned.[55]

Here, the evidence showed that, apart from lack of market demand, there is no impediment to Venture developing and using the property for R&D use. A complete lack of available sewer capacity issue would affect both general commercial and R&D developments. However, the Township presented evidence that there was sufficient sewer capacity to serve an R&D development. The trial court did not clearly err in finding that Venture failed to show that the property was unsuitable for use as zoned.

c. Unmarketable As Zoned

Venture argues that there is no current market for R&D uses, and that there is no sewer capacity to support an R&D development on the property. Therefore, according to Venture, the property is unmarketable as zoned.

In *Bevan*, the plaintiffs argued that enforcement of an ordinance governing the width of private access roads effected a taking, because it denied them economically viable use of their land.[56] Addressing the plaintiffs' argument that the property was not marketable as zoned, the *Bevan* Court stated:

> Nor has it been shown that [the] plaintiffs' property would be unmarketable if it were developed with a single residence in accordance with the ordinance. Although the Court of Appeals concluded that [the] plaintiffs' attempts to sell the property have been unsuccessful, . . . the record reflects only that one attempt to sell to the Department of Natural Resources was unsuccessful. No evidence was provided, and no factual findings were made, concerning the extent of the effort or methods used in attempting to sell the property. The record does not reflect the price at which the property was offered, or the value of comparable lands, or any other evidence that would justify a conclusion that the property as zoned is unmarketable. Although there may be a disparity between the value of the land with a single home as compared to two homes, there is no record evidence of the extent of that disparity. As we have said, [a] showing of confiscation will not be justified by showing a disparity in value between uses.[57]

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[54] *Troy Campus v City of Troy*, 132 Mich App 441, 450-451; 349 NW2d 177 (1984). However, a plaintiff need not introduce evidence that the property is not developable for public uses. *Troy Campus*, *supra* at 451-453. Further, a court can draw inferences concerning the suitability of the property for specialized purposes, such as agricultural uses or for use as a golf course. *Id*. at 453-454.

[55] *Bevan*, *supra* at 404.

[56] *Id*. at 388, 397-398, 402.

[57] *Id*. at 404-405 (internal quotations and citations omitted).

In *Brae Burn*, the Court found that because there was a new and successful residential development just south of the plaintiff's property, the plaintiff failed to show that the land was unsuitable for residential purposes, or that there was a "lack of market for such purpose" at that location, or that the parcel was "'dead land' without residential value."[58] Similarly, in *Kirk v Tyrone Twp*, the Court found that, although the plaintiffs' property was worth more as a mobile home park than as a single-family residential subdivision, "the property still has sufficient value to ensure [the] plaintiffs a profit on their investment," and there was no showing that there was no market for single-family homes at that location.[59] By contrast, in *Long v City of Highland Park*, the Court found that, given the character of other uses located on Woodward Avenue at that location in Highland Park, the plaintiff had successfully shown that the property was not marketable as single-family dwelling.[60] The same is true of *Janesick v Detroit*, in which the plaintiff proved that the property was not marketable as zoned because no financial institution would finance a residential development at that location due to the proximity of City Airport and light manufacturing uses, including a railroad right of way.[61]

Here, Venture argues that as a result of a sluggish economy, the property is unmarketable as zoned. Venture argues that courts must determine whether the regulation has deprived a property owner of all economically viable use of the land with reference to currently existing conditions, not hypothetical future conditions. Therefore, appraisals prepared in contemplation of the possibility that there may be a market for R&D properties in the future should not be determinative of whether the land has any value as zoned.

In *Christine Bldg Co v City of Troy*, cited by Venture, the Michigan Supreme Court stated that "the reasonableness of a zoning restriction must be tested according to existing facts and conditions and not some condition which might exist in the future."[62] Accordingly, the Court concluded that the city could not reasonably use the zoning ordinance to control population growth where there was no present danger of overpopulation affecting public health, safety, and welfare, and many of the city's homes were not even connected to the public sewer system.[63] In *Troy Campus*, also cited by Venture, this Court stated that "[w]hile a master plan constitutes a general guide for future development, the validity of a zoning regulation must be tested by existing conditions."[64] The Court found that, given the surrounding uses, the location of the property, and other currently existing conditions, the zoning classification was invalid

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[58] *Brae Burn*, *supra* at 435 (internal quotation and citation omitted).

[59] *Kirk v Tyrone Twp*, 398 Mich 429, 444-445; 247 NW2d 848 (1976).

[60] *Long v City of Highland Park*, 329 Mich 146, 151-154; 45 NW2d 10 (1950).

[61] *Janesick v Detroit*, 337 Mich 549, 551-552, 555-557; 60 NW2d 452 (1953).

[62] *Christine Bldg Co v City of Troy*, 367 Mich 508, 516; 116 NW2d 816 (1962).

[63] *Id*. at 518-519.

[64] *Troy Campus*, *supra* at 457.

because it failed reasonably to advance any legitimate government interest and imposed a significant burden on private property rights.[65]

In *Christine Bldg Co* and *Troy Campus*, the Court made reference to current conditions in the context of evaluating the *soundness* of the justifications that the government proffered for a particular zoning decision. Evaluating the *soundness* of the justifications proffered by the government is essentially a due process test and no longer a legitimate way to evaluate a takings claim. In any event, the Township did not seek to justify the R&D zoning of Venture's property on the basis of hypothetical nonexistent conditions, nor did the Township ignore the current physical conditions existing in the area in deciding that R&D zoning was appropriate. Thus, we conclude that *Christine Bldg Co* and *Troy Campus* are inapplicable.

Venture presented evidence at trial that it marketed the property as R&D for three years and received only one serious offer. The Township presented evidence that Venture's asking price may have been too high for market conditions and that Venture focused on marketing the property for commercial uses rather than permitted R&D uses. The Township also presented evidence of the substantial appraised value of the property as zoned. The appraisers testified that they took the current market into consideration when determining how much the property was worth.

The evidence did not show that the property was unmarketable as zoned *because* of its zoning classification. Rather, Venture's marketing problems arose from a downturn in the economy. Venture failed to prove that the R&D zoning classification destroyed the value of its land, or show that the R&D zoning classification completely deprived it of all economically beneficial use of the property. The Township's ordinance did not effect a taking of Venture's property.

The hardships suffered by Venture are the result of a downturn in the economy. While the property might sell faster and command a higher price if it were zoned general commercial, a disparity of value between uses is insufficient to show a taking.[66]

(5) Balancing Test

Venture argues that there has been a taking under the *Penn Central* balancing test because the Township's action was arbitrary and capricious, the effect of the R&D regulation is confiscatory, and the denial of Venture's rezoning petition has interfered with distinct, investment-backed expectations.

The Township notes that Venture purchased the property with notice that it was zoned R&D. As Venture argues, however, such knowledge does not preclude it from challenging what it believes are "unreasonable limitations on the use and value of land."[67]

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[65] *Id*. at 459-460.

[66] *Bevan*, *supra* at 404-405.

[67] *Palazzolo v Rhode Island*, 533 US 606, 627-628; 121 S Ct 2448; 150 L Ed 2d 592 (2001).

The *Penn Central* Court "identified several factors that have particular significance" in determining whether a taking has occurred.[68] "Primary among those factors are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[69] "In addition, the character of the governmental action—for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good—may be relevant in discerning whether a taking has occurred."[70]

Similarly, in *K & K Constr*, the Michigan Supreme Court held that in applying the *Penn Central* balancing test, courts "must engage in an "ad hoc, factual inquir[y]," focusing on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations.[71] As we noted previously,

> our regulatory takings . . . inquiries . . . share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.[72]

Accordingly, "the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."[73]

Here, the "character" of the Township's action is the board of trustees' denial of Venture's rezoning petition. The denial is neither a physical invasion of the property nor a "public program adjusting the benefits and burdens of economic life to promote the common good." Rather, Venture wished the Township to adjust the R&D zoning of the property in order to relieve Venture from the hardship resulting from a downturn in the economy. As we have already held, the Township's decision to deny Venture's petition was not arbitrary or capricious. Rather, the Township based its decision on its zoning ordinance and its plan for development of the township as a coherent whole. Therefore, this factor does not favor Venture.

The economic impact of the Township's decision is debatable. The property was appraised at $6 million by Integra Realty in May 2000, and at $5.5 million by Donald Wieme in February 2001. While Venture paid $4.9 million for the original parcel, and an additional

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[68] *Lingle*, *supra* at 538 (internal quotations omitted).

[69] *Id*. (internal quotations and citation omitted).

[70] *Id*. at 539 (internal quotations and citation omitted).

[71] *K & K Constr*, *supra* at 577.

[72] *Lingle*, *supra* at 539.

[73] *Id*. at 540.

$455,000 for the three smaller lots, it sold the residential portion of the original parcel for $1.96 million. Thus, not including due diligence and other costs, Venture paid approximately $3,385,000 for the property at issue in this case. In October 2004, Keith Darin conducted an economic feasibility analysis and concluded that, given the current market for R&D properties, development of Venture's proposed R&D site plan, even if approved by the Township, was economically unfeasible on a speculative basis, as contrasted with a preleasing or build-to-suit basis. Nonetheless, Integra Realty appraised the property at $4,310,000 in January 2003, Wieme appraised it at $4,550,000 in June 2003, and Fuller appraised it, on the Township's behalf, at $4.63 million in April 2005. Thus, even if the value of the property diminished since the time of purchase, the evidence disclosed that the property retained substantial value. In any event, although Venture has been unable to sell or develop the land, Venture failed to show that the Township's decision not to rezone the property to general commercial had an adverse economic impact on the property. Rather, the hardship experienced by Venture was the result of a downturn in the economy, not the Township's decision. This factor does not favor a taking.

Concerning investment-backed expectations, the evidence showed that Venture purchased the property as zoned R&D, under the belief that the property was well suited for R&D development. Despite such suitability, Venture has been unable to sell or develop the property as zoned R&D, and the Township has refused to rezone it to an allegedly more marketable general commercial. However, the Township's decision is not what interfered with Venture's investment-backed expectations of making a substantial profit by developing the property. Rather, it was principally the economy that deprived Venture of a current market for its property, as zoned. Thus, this factor also fails to favor a taking.

In sum, none of the factors of the *Penn Central* balancing test tend to favor Venture's argument that there was a regulatory taking. We therefore conclude that the trial court's decision that there was no taking is neither clearly erroneous nor against the great weight of the evidence.

IV. Summary Disposition

Venture also argues that the trial court erred in denying its pretrial motions for summary disposition, in which it argued that the Township's refusal to rezone its property constituted a categorical taking of its property. At trial, however, Venture raised the same arguments and introduced, or used for impeachment, the same exhibits that it submitted with its motions. Our foregoing analysis applies equally to an analysis of Venture's summary disposition motions and, for those same reasons, the trial court properly denied Venture's motions for summary disposition. The trial court properly determined that there were questions of fact for trial and that Venture failed to show that it was entitled to judgment as a matter of law.[74]

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell

[74] MCR 2.116(C)(10); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996).

/s/ Kirsten Frank Kelly